89-1900

(1)

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,

Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the plaintiff introduces statistical analyses sufficient to establish a prima facie case of intentional discrimination, may the defendant rebut those analyses by showing that they are unreliable because flawed?

2. In light of *Watson v. Fort Worth Bank & Trust*, 487 US 977 (198[illegible]), did the court of appeals misstate the law when it required a district court, in order to discount a plaintiff's statistical analyses because of flaws in those analyses, to find that the defendant had shown that correcting those flaws in the plaintiff's analyses eliminates any statistical disparity that could support an inference of discrimination?

3. In a disparate treatment case in which intentional discrimination is at issue, does a defendant company waive the privilege protecting its self-critical affirmative action analyses by presenting evidence of its equal opportunity efforts?

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OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

General Telephone Company of the Northwest, Inc. ("GenTel" or "defendant")[2] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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1 All parties appear in the caption of this case.

2 GTE Corporation is petitioner's parent company; petitioner has no subsidiaries.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-17a, *infra*) is reported at 885 F.2d 575. The oral opinion of the district court (App. B, 18a-26a, *infra*) is not reported. The findings of fact and conclusions of law of the district court (App. C, 27a-39a, *infra*) are reported at 40 Fair Empl. Prac. Cas. (BNA) 1533 (W.D. Wash. 1986). The memorandum opinion of the Court of Appeals (App. D, 40a-44a, *infra*), withdrawn upon reconsideration, is not reported; neither is the order denying rehearing and rejecting the suggestion for a rehearing en banc (App. E. 45a, *infra*).

JURISDICTION

The opinion of the Court of Appeals was filed September 12, 1989. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion en banc was filed March 6, 1990. This court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e *et seq*, provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer--
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

The Equal Employment Opportunity Commission ("EEOC" or "plaintiff") brought this action contending that GenTel had unlawfully discriminated against women through a practice of excluding them from higher-paying jobs.[3]

The district court found for defendant. The court concluded that GenTel "sufficiently rebutted any inference of discrimination created by plaintiff's statistical and anecdotal evidence to prevail under the disparate treatment theory under Title VII." (App. C, 39a.)[4] Significant in this regard were the trial court's findings that plaintiff's "statistical studies and analyses * * * contained various critical flaws." (App. C, 34a.) "The most significant flaw" identified by the district court "was the failure to analyze in a meaningful way the extent to which career interests differed between males and females, and the effect of these differ-

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[3] This case has previously reached this Court. In *General Telephone Company v. EEOC*, 446 U.S. 318 (1980), this Court affirmed the Court of Appeals' affirmance of the district court's denial of GenTel's motion to dismiss the class aspects of the litigation for failure to comply with Fed. R. Civ. P. 23.

[4] This case was tried under the legal theories of disparate treatment and disparate impact. The district court found for defendant under both theories. Plaintiff appealed only under the disparate treatment theory.

ences upon the placement of employees at [GenTel]." (App. C, 34a.). The court found this flaw significant as a result of concluding that defendant's evidence "established a correlation between job interests and job placements" at GenTel. (App. C, 34a.)

The EEOC appealed the district court's determination as it applied to hiring, but not as it applied it to promotions.[5]

The Court of Appeals, in its initial memorandum decision, stated that the "EEOC appeals the district court's decision on two grounds. First, that the district court erred by not finding general discrimination where fewer women than men were initially assigned to higher paying jobs. Second, the EEOC argues that the district court erred in admitting evidence offered by GenTel of its affirmative action programs." (App. D, 41a.)

On the first issue, the Court of Appeals observed that the district court had found that "none of the EEOC's statistical studies sufficiently accounted for the diverse job interests of men and women" and concluded that "[t]here is not sufficient support in the record to find that the district court judge committed reversible error in reaching this conclusion." (App. D, 42a.)

On the second issue, the Court of Appeals wrote:

> "The EEOC also challenges the district court admission at trial of evidence offered by GenTel regarding its affirmative action efforts. The evidence did not include self-critical material, as such material had been exempted from discovery for policy reasons. The EEOC argues that the admission was unduly prejudicial to its case." (App. D, 42a-43a.)

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5 The EEOC stated at page 3, note 4, of its opening brief to the Ninth Circuit that "we do not believe the promotion findings can be challenged for clear error."

The circuit court, however, "decline[d] to decide the issue * * * because even if the decision to admit the evidence was error, the district court's admission of the evidence would not amount to an abuse of discretion constituting reversible error." (App. D, 43a.) The court provided two reasons:

> "First, there was an abundance of alternative evidence presented at trial which would support the judgment. Second, the district court's findings themselves indicate that the judgment was primarily based on determinations as to the relative value of the statistical (and other unchallenged) evidence offered by the respective parties." (App. D, 43a.)

The EEOC petitioned for rehearing on the issue of the strength of its statistical analyses.

The Court of Appeals withdrew its memorandum disposition and, upon reconsideration, reversed itself on both issues originally presented by plaintiff for review. The Court of Appeals concluded that "[t]he district court failed to assess properly the probative value of the EEOC's statistical evidence, in light of GenTel's opposing evidence." 885 F.2d at 584 (App. A, 17a). The reason provided for the court's new position was the conclusion that GenTel was required to produce and had failed "to produce credible evidence that curing the alleged flaws [in plaintiff's statistical analyses] would also cure the statistical disparity" that plaintiff argued evidenced sex discrimination. 885 F.2d at 583 (App. A, 14a).

The Court of Appeals also held that "the district court abused its discretion by admitting GenTel's equal opportunity evidence, once it had exempted GenTel's self-critical material from discovery." 885 F.2d at 578-79 (App. A, 6a). The Court reasoned that by offering the equal opportunity evidence, GenTel waived the privilege that otherwise protected certain self-critical analyses.

GenTel sought reconsideration, which the Court of Appeals denied.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning evidentiary burdens of employers in disparate treatment cases in which the EEOC alleges a pattern and practice of intentional employment discrimination.

The recent opinions in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. __, 104 L. Ed. 2d 733 (1989), discuss the evidentiary standards and burden of proof requirements that apply in two types of Title VII cases, allegation of disparate treatment of an individual and allegation of disparate impact of a company practice on a class of individuals.

Watson reiterates "the evidentiary standards that apply when an *individual* alleges [discrimination in violation of Title VII]." 487 U.S. at 985-86 (emphasis added).[6]

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[6] "In such 'disparate treatment' cases, * * * the plaintiff is required to prove that the defendant had a discriminatory intent or motive. In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are 'intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.' Under that scheme, a prima facie case is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants with qualifications similar to the plaintiff's. The burden of proving a prima facie case is 'not onerous,' and the employer in turn may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision. If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination." 487 U.S. at 986 (citations omitted).

Watson also provided "evidentiary guidelines" for the trial of disparate impact cases. *Watson*, 487 U.S. at 991-99 (opinion of O'Connor, J.). *See also Wards Cove*, 490 U.S. at ___, 104 L. Ed. 2d at 750 ("The law in this respect was correctly stated by Justice O'Connor's opinion last Term in *Watson*").

This case presents the Court with the opportunity to similarly clarify the evidentiary guidelines that should apply in the third type of Title VII case, where the EEOC under a disparate treatment theory charges that a company has engaged in a pattern and practice of intentional discrimination.

1. The issue of a defendant's rebuttal burden in a Title VII pattern and practice case.

In a pattern and practice disparate treatment case, the plaintiff has "the initial burden of making out a prima facie case of discrimination." *Teamsters v. United States*, 431 U.S. 324, 336 (1977). The plaintiff, the EEOC in this case, also has the ultimate burden of proving that the defendant engaged in the "pattern or practice" of discrimination against female employees, *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (per curiam) (Brennan, J., writing for the majority, concurring in part), and that the defendant discriminated intentionally. *Teamsters*, 431 U.S. at 375 n.14.

In a pattern and practice case, a plaintiff's prima facie case will commonly rely heavily on statistical evidence, often multiple regression analyses, to demonstrate apparent gender-specific disparities. *See, e.g., E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 308 (7th Cir. 1988). *See also Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977).

The issue presented here concerns what type of evidence may suffice to rebut the apparent probative value of a plaintiff's statistical analyses. Specifically, is a defendant

required to present countervailing statistical evidence that establishes the absence of any statistically significant gender-based disparity of the sort argued for by the plaintiff? Or may the defendant rebut the prima facie case created by the plaintiff's statistics by showing that the plaintiff's statistics are so flawed that they are nonprobative of the plaintiff's position?

In *Teamsters*, this Court held that statistics are "competent in proving employment discrimination." 431 U.S. at 339. At the same time, the Court cautioned that "statistics are not irrefutable * * * and, like any other kind of evidence, they may be rebutted." 431 U.S. at 340. The Court also observed that in responding to a plaintiff's statistics there are no "particular limits on the type of evidence an employer may use." 431 U.S. at 360 n.46.

Shortly after *Teamsters*, (then) Justice Rehnquist commented further on various alternative responses available to rebut a case built upon statistics:

> "If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics * * *, the opportunity to challenge them is available to the defendants just as in any other lawsuit. *They may endeavor to impeach the reliability of the statistical evidence*, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded." *Dothard v. Rawlinson*, 433 U.S. 321, 338-39 (1977) (Rehnquist, J., concurring in the result and concurring in part) (emphasis added).

Although this was stated in a concurring opinion, no member of the Court, in *Dothard* or subsequently, has disagreed that one way to dispute the probative value of statistical evidence is "to impeach the reliability" of the statistics.

In 1986, the Court in *Bazemore* discussed the use of statistical analyses in discrimination cases. The Court, through Justice Brennan concurring, held that in a Title VII pattern and practice case "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case," and that consequently the Court of Appeals erred in ruling a regression analysis inadmissible simply because it did not include all appropriate measurable variables. 478 U.S. at 400 ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility").

But the Court also stated that "[w]hether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant." 478 U.S. at 400 (Brennan, J., concurring). This determination, the Court remarked, is for the trial court to make, "subject to the clearly-erroneous standard on appellate review." 478 U.S. at 398 (Brennan, J., concurring).

Thus it is not evident that anything in *Bazemore* encourages, let alone requires, a change in the common sense principles expressed, for instance, by the Court in *Teamsters* and by (now) Chief Justice Rehnquist in *Dothard*.

The Ninth Circuit, nevertheless, reads *Bazemore* as dictating a profound reduction in the rebuttal responses available to a Title VII defendant. The Court of Appeals, in concert with what it judges to be the views of the Second, Eighth, and District of Columbia Circuits,[7] states that "*Bazemore* requires that the defendant do more than simply point out possible flaws in the proponent's statistical analyses," 885 F.2d at 579 (App. A, 8a), and infers that under *Bazemore*, "the defendant cannot rebut an inference of discrimination by * * * pointing to flaws in the plaintiff's

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[7] *But see* note 10, *infra*.

statistics." 885 F.2d at 581 (App. A, 12a).[8] Rather, a defendant may "overcome the probative force of a plaintiff's statistical evidence" only by showing that correcting the analyses for the flaws removes the statistical disparities on which the plaintiff relies. 885 F.2d at 579 (App. A, 7a).

Astonishing as it may seem, the Court of Appeals turns a blind eye to the elementary distinction between discrediting an opponent's premises and disconfirming the opponent's conclusion. In pattern and practice discrimination cases, the plaintiff's premises typically are statistical analyses, and the plaintiff's conclusion is that the defendant has discriminated in violation of Title VII. Ideally, perhaps, the defendant would discredit the plaintiff's statistics--for example, by calling plaintiff's assumptions or procedures into question--and would also affirmatively present evidence, through its own statistical analyses and otherwise, showing the plaintiff's conclusion to be false. Logically, however, the defendant does not have to do both. In a particular case, undermining the credibility of the plaintiff's statistics may completely rebut the plaintiff's case. It is just this possibility, however, that the Ninth Circuit rejects as a matter of law.

In the decision below, the Court of Appeals objected that the "district court did not properly assess the probative value of the EEOC's evidence in light of GenTel's attacks upon it." 885 F.2d at 582 (App. A, 14a). The district court had found that defendant had demonstrated a relationship between the career interests of men and women and their job placements (App. C, 34a), and that plaintiff's statistical analyses were critically flawed because they failed to analyze the effect of career interests on job placement (App. C, 34a). For this reason, among others, the district court found plaintiff's statistics unpersuasive. The Court of Appeals,

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8 The Court of Appeals' words are that the defendant cannot impeach a plaintiff's statistics by "*merely* pointing to flaws." 885 F.2d at 581 (App. A, 12a) (emphasis added).

however, rejected the district court's "findings * * * as to the probative value of [plaintiff's statistical] evidence" on the ground that the findings were "not supported with any explanation of how adequately adjusting for the alleged flaws would have *eliminated the disparities* shown in the EEOC's statistical analyses." 885 F.2d at 579 (App. A, 7a) (emphasis added). The Court of Appeals holds that pointing up flaws in a plaintiff's statistics is insufficient as a matter of law to defeat a claim of discrimination based on those statistics. 885 F.2d at 582-583 (App. A, 14a-15a).

If this view needed refutation, *Watson* provided it. In *Watson*, the Court held that disparate impact analysis is applicable under Title VII to subjective or discretionary employment practices. The Court also found it appropriate, through Justice O'Connor's plurality opinion, to clarify for the lower courts "appropriate evidentiary guidelines" that apply in trials of disparate impact cases.

In discussing a plaintiff's statistical showing, the Court reminded:

> "[Neither] courts [nor] defendants [are] obliged to assume that plaintiffs' statistical evidence is reliable. 'If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.'" 487 U.S. at 996 (citations omitted) (opinion of O'Connor, J.).[9]

"Without attempting to catalog all the weaknesses that may be found in such evidence," the Court discussed several ways in which a defendant could impeach the relia-

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[9] Although *Watson* is, in part, a plurality opinion, the Court has subsequently adopted significant portions of that plurality opinion. *See, e.g., Wards Cove*, __ U.S. at __, 104 L. Ed. 2d at 754 (Blackmun, J., dissenting) (the Court "reaches out to make last Term's plurality opinion in *Watson* * * * the law").

bility of a plaintiff's statistics in a disparate impact case. 487 U.S. at 996. The Court acknowledged that a party may always impugn the credibility of an opposing party's statistical analyses, as well as "adduce countervailing evidence" to the conclusions of these analyses.

Nothing in this discussion suggests that this acknowledgment is limited to disparate impact cases. To the contrary, the Court cites *Hazelwood School District v. United States*, 433 U.S. 299 (1977), a pattern and practice disparate treatment case, for one example of impeaching the reliability of proffered statistical evidence.

The position of the Ninth Circuit is contrary to age-old principles of proof and refutation, endorsed as a matter of course by this Court. It is not surprising, therefore, that the Court of Appeals' decision is also inconsistent with the explicit position of at least one other court of appeals.[10] As

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[10] The Court of Appeals maintains that it has joined ranks with the Second, Eighth, and District of Columbia Courts of Appeals on the issue of a defendant's rebuttal burden. This is highly debatable. The Court of Appeals rests its assertion on the observation that:

> "Since *Bazemore*, * * * [t]he majority of * * * courts have concluded that *Bazemore* requires that the defendant do more than simply point out possible flaws in the proponent's statistical analyses in order to rebut the inference of discrimination raised by the statistical evidence." 885 F.2d at 579 (App. A, 8a).

This, however, is a puzzling statement. It is wholly uncontroversial that in the employment discrimination context, as elsewhere in the law, "mere possibility" carries little probative weight. GenTel agrees that the Second, Eighth, and District of Columbia Courts of Appeals hold that "a defendant cannot overcome a strong statistical showing of discrimination merely by making an unsubstantiated assertion of error," 885 F.2d at 580 (App. A, 9a), but GenTel also doubts that these courts have adopted the particular position of the Ninth Circuit on a defendant's rebuttal burden.

the lower court recognizes, the Seventh Circuit explicitly rejected the view adopted by the Ninth Circuit. *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).

In *Sears*, which involved an allegation by the EEOC that a company had engaged in a pattern and practice of discrimination against women in hiring, the EEOC advocated precisely the position that the Ninth Circuit has adopted. "The EEOC [had] presented, almost exclusively, statistical evidence in the form of regression analyses * * *." 839 F.2d at 312. "Sears [had] not respond[ed] with like regression analyses," the Seventh Circuit observed. 839 F.2d at 312. "Instead, most of Sears' evidence was directed at undermining two assumptions Sears claimed were faulty and fatal to the validity of the EEOC's statistical analysis * * * ." 839 F.2d at 312. The EEOC argued that "'where plaintiffs present a sound statistical *prima facie* case, there is a substantial burden on the defendant to respond * * * with a *more probative analysis*.'" 839 F.2d at 309 (emphasis added). *See also* 839 F.2d at 313 ("The EEOC implies that Sears had the burden of responding with a more probative *statistical* analysis") (emphasis in original).

The Court of Appeals for the Seventh Circuit rejected this position. Citing *Teamsters* and (then) Justice Rehnquist's concurrence in *Dothard*, the Seventh Circuit held that "statistical evidence is only one method of rebutting a statistical case," 839 F.2d at 314, and that

> "[w]hatever the nature of the defendant's evidence, '*the defendant need not carry the burden of persuasion as to the nonexistence of a disparity.*'" 839 F.2d at 309 (citation omitted) (emphasis added).

In sum, because the Ninth Circuit Court of Appeals, in addressing the critical question of a defendant's rebuttal burden in a Title VII pattern and practice case, has imposed

a burden of proof that conflicts with the teachings of this Court, as well as with at least one other Court of Appeals, the petition for a writ of certiorari should be granted.

2. The issue of a defendant's waiver of the privilege protecting self-critical portions of affirmative action plans.

Employers, like GenTel, who contract with the federal government,[11] are required to file annual affirmative action plans in accordance with Executive Order No. 11246, as amended by Executive Order No. 11375.[12]

The contents of affirmative action plans are governed by 41 C.F.R. Part 60-2, Subpart B. A company is required, among other things, to report if minorities or women are "underutilized," where "underutilization" is determined by government-prescribed statistical procedures.[13] Using these "underutilization" figures, the company must also provide "an analysis of areas within which the [company] is deficient in the utilization of minority groups and women, and [also] goals and timetables to which the [company's] good faith efforts must be directed to correct the deficiencies." 41 C.F.R. § 60-2.10. As a result, an affirmative action plan will include, in addition to various statistical data, a

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11 *See* 41 C.F.R. § 60-2.1.

12 Executive Order No. 11246 of September 24, 1965, enunciated a policy of equal opportunity in government employment, employment by federal contractors and subcontractors, and employment under federally assisted construction contracts regardless of race, creed, color, or national origin. Executive Order No. 11375 of October 13, 1967, amended Executive Order No. 11246 expressly to include discrimination on account of sex.

13 These procedures, while arguably supportive of federal affirmative action policy, are not generally probative in a Title VII context.

recitation of the company's efforts to comply with Title VII and also self-critical analyses produced responsive to the federal goal of providing enhanced employment opportunities for minorities and women.

In a pattern and practice case, the EEOC will typically seek discovery of company affirmative action plans. The EEOC did so in this case, and in this case, the EEOC obtained discovery of all of GenTel's affirmative action plan materials except GenTel's self-critical analyses.[14]

At trial, defendant introduced evidence of its efforts to provide equal employment opportunity for women.

On appeal the EEOC argued that the district court erred in permitting defendant to introduce evidence of its equal opportunity efforts, "while shielding from discovery those parts of [GenTel's] affirmative action plans containing self-critical analyses." (EEOC's Reply Brief to the Ninth Circuit at 16.)

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14 The district court held that the self-critical portions of GenTel's affirmative action plans were privileged. The recognition by the lower courts of a qualified privilege protecting such self-critical analyses is not contrary to this Court's recent decision in *Univ. of Pennsylvania v. EEOC*, 493 U.S._, 107 L. Ed. 2d 571 (1990). The qualified privilege protecting self-critical portions of affirmative action plans does not, unlike the privilege claimed by the University of Pennsylvania, protect information regarding the reasons for particular employment decisions. Nor in this case was the EEOC denied discovery of any of defendant's employment data or statistical analyses. Furthermore, as various courts have found, recognition of the limited privilege acknowledged in this case furthers federal affirmative action policy. *See, e.g., Dickerson v. U.S. Steel Corp.*, 14 Fair Empl. Prac. Cas. (BNA) 1448, 1449 (E.D. Pa. 1976) ("[T]he defendant's public policy argument does apply to affirmative action * * * materials that contain United States Steel's proposed goals and timetables or evaluations of its progress. Disclosure of such subjective information could discourage employers from making the candid internal evaluations that the affirmative action program envisions").

The Court of Appeals accepted the EEOC argument and held that "when an employer *voluntarily* uses evidence of its equal opportunity efforts to prove nondiscrimination, it 'opens the door'" and waives its qualified privilege to protect the self-critical portions of its affirmative action plans. 885 F.2d at 578 (App. A, 5a) (emphasis in original). The Court of Appeals adopted without amplification the explanation offered by the Seventh Circuit, the only other circuit court to address this issue:

> " '[A]n employer should not be able to offer its affirmative action policy before the trier of fact as a manifestation of nondiscrimination and at the same time be able to hide self-critical evaluations that may undercut the employer's portrayal of its efforts. Fairness requires that the qualified privilege not be allowed to mask discrimination when the overall policy behind the privilege is directed towards eliminating it.' " 885 F.2d at 578, quoting *Coates v. Johnson & Johnson*, 756 F.2d 524, 552 (7th Cir. 1985).

The position adopted by the Seventh and Ninth Circuits, however, places defendants in intentional discrimination cases in an impossible position. On the one hand, companies would have a difficult task defending these cases if they could not introduce evidence probative of the absence of their intent to discriminate. This evidence would prominently include company procedures and policies adopted to ensure company compliance with the equal opportunity requirements of Title VII. On the other hand, for a federal contractor, this evidence inevitably involves components of its affirmative action plans, and hence its introduction would waive the otherwise protected, and highly

prejudicial,[15] self-critical analyses contained in the affirmative action plans.

In *Watson*, the defendant company warned that permitting a plaintiff to apply the disparate impact analysis to subjective employment practices could make it "impossibly expensive [for a company] to defend such practices in litigation." 487 U.S. at 992 (opinion of O'Connor, J.). The defendant maintained that in that case, "employers' only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case." 487 U.S. at 992 (opinion of O'Connor, J.).

The Court acknowledged this danger.

> "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." 487 U.S. at 993 (opinion of O'Connor, J.).

Because such quotas "would be 'far from the intent of Title VII,' " 487 U.S. at 993 (opinion of O'Connor, J.) (citations omitted), the Court provided "evidentiary guidelines" that address employers' legitimate concerns about proof in disparate impact cases.

The same danger exists here. Employers who contract with the federal government may reasonably conclude

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15 *See, e.g., Jamison v. Storer Broadcasting Co.*, 511 F. Supp. 1286, 1296 (E.D. Mich. 1981).

that given the waiver rule adopted by the Seventh and Ninth Circuits, "the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability," is "to adopt inappropriate prophylactic measures." *See* 487 U.S. at 993, 992 (opinion of O'Connor, J.).

This concern should prompt the Court to also review the waiver rule adopted by the Court of Appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 4, 1990

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**Nos. 85-4422**
	)	**85-4437**
Plaintiff-Appellant/ Cross-Appellee,	)	**86-3732**
	)	**D.C. No. CV 77-247-C**
v.	)	
GENERAL TELEPHONE COMPANY OF NORTHWEST, INC.,	)	**Filed September 12, 1989 Cathy A. Catterson Clerk U.S. Court of Appeals**
Defendant-Appellee/ Cross-Appellant.	)	**OPINION**

Appeal From the United States District Court
For the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted June 2, 1987

Memorandum Disposition Filed
February 9, 1988 Withdrawn

Decided September 12, 1989

Before: POOLE, FERGUSON, and CANBY, Circuit Judges.

FERGUSON, Circuit Judge:

The Equal Employment Opportunity Commission (EEOC) appeals the district court's decision in the EEOC's gender discrimination action against General Telephone Company of the Northwest (GenTel). The EEOC argues that the district court erred in holding that GenTel did not discriminatorily deny its female employees access to higher-paying positions in violation of Title VII.

Initially, this panel affirmed the decision of the district court in a memorandum disposition. Upon reconsideration, that decision is withdrawn. We now reverse the decision of the district court.[1]

I.

This action arose as the result of numerous gender discrimination charges against GenTel filed with the EEOC. The EEOC brought an action in which it contended that GenTel had engaged in a variety of improper practices which resulted in women being denied access to higher paying jobs within the company.

At a bench trial, the district court received oral and written testimony, along with anecdotal evidence of specific instances of sex discrimination,[2] statistical evidence in the form

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[1] As Justice Rutledge once wrote, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Wolf v. Colorado*, 338 U.S. 25, 47, 69 S.Ct. 1359, 1368, 93 L.Ed. 1782 (1949) (Rutledge, J., dissenting).

[2] The district court found that the EEOC's anecdotal evidence of discrimination was uncontroverted. The court found this insufficient by itself, however, to establish class-based gender discrimination.

of regression analyses,[3] and evidence regarding GenTel's equal employment opportunity policies and programs. The court rejected the EEOC's regression analyses showing substantial disparities in the treatment of men and women in various job classifications and its anecdotal evidence of sex discrimination, and concluded that the EEOC had failed to prove that GenTel engaged in a company-wide pattern or practice of intentional discrimination in violation of Title VII, 42 U.S.C. § 2000e.[4] The court based its judgment on the collective effect of four findings: (1) that the EEOC's statistical studies failed "to analyze in a meaningful way the extent to which career interests differed between males and females"; (2) that men and women had substantially different job and career interests, which GenTel demonstrated were related to job placements; (3) that GenTel had an active commitment to equal opportunity in employment; and (4) that the gender balance of GenTel's work

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[3] A regression analysis is "a common statistical tool . . . designed to isolate the influence of one particular factor--[e.g.,] sex--on a dependent variable--[e.g.] salary." *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 21-22 (2d Cir. 1988). Professors Baldus and Cole define regression analysis as:

> The use of an algebraic formula to express the influence of one or more independent variables (e.g., racial status . . .) on the average level of a dependent variable (e.g., selection rate . . .). Also the computational procedure through which the terms of this formula are estimated.

D. Baldus & J. Cole, Statistical Proof of Discrimination, 357 (1980).

[4] In its decision, the district court evinced uncertainty as to the applicability of disparate impact analysis to cases such as this. We note that the established law in this circuit now clearly permits the use of such analysis. See *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1293, 99 L.Ed.2d 503 *cert. granted in part*, ____U.S.____, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988).

force compared favorably with statistics for other public utilities and craft vocations in Washington state and nationwide. After concluding that GenTel was the prevailing party, the district court awarded GenTel attorney's fees and costs.

The EEOC appeals the district court's decision on two grounds. First, it argues that the district court erred in admitting evidence of GenTel's equal employment opportunity efforts after having exempted from discovery relevant self-critical materials. The EEOC also contends that the district court erred by not finding discrimination where fewer women than men were initially assigned to higher-paying jobs as allegedly demonstrated by its statistical and other evidence.

GenTel cross-appeals, claiming that the court erred in calculating the costs and fees to which it was entitled as the prevailing party. GenTel argues that it was entitled to an additional $425,000 in costs for expert witness fees. GenTel also claims, in the event of a reversal of the district court judgment, that the district court lacked proper jurisdiction over those of the EEOC's claims which alleged gender discrimination in the promotion of hourly-based workers in various job classifications.

II.

A.

At trial, the district court admitted voluminous evidence offered by GenTel regarding its equal opportunity efforts. This evidence consisted in part of testimony from GenTel management and other employees charged with oversight and implementation of the company's affirmative action programs and complaint process. The remainder of this evidence was comprised of over two hundred pages of exhibits, including policy statements, in-house newspaper articles, and letters referring to GenTel's commitment to equal opportunity. The EEOC repeatedly objected to the admission of this evidence. The EEOC argues on appeal that admission of this evidence was an abuse of discretion because the court had previously precluded the

EEOC from discovering relevant self-critical material. We agree.

It is clear that affirmative action or equal opportunity evidence is relevant to and probative of an employer's intent not to discriminate. *See Coser v. Moore*, 739 F.2d 746, 751 (2d Cir.1984); *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 472 (8th Cir.1984); *Ottaviani v. State Univ. of New York*, 679 F.Supp. 288, 309 (S.D.N.Y.1988).

Some courts have, however, extended a qualified privilege to self-critical portions of an employer's equal opportunity efforts, rendering them exempt from discovery under appropriate circumstances. *See, e.g., Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir.1985); *Jamison v. Storer Broadcasting Co.*, 511 F.Supp. 1286, 1296-97 (E.D.Mich.1981), *aff'd in part and rev'd in part*, 830 F.2d 194 (6th Cir.1987). Underlying this privilege is the goal of removing discrimination from the work place. But when an employer *voluntarily* uses evidence of its equal opportunity efforts to prove nondiscrimination, it "opens the door" and waives whatever qualified privilege may have existed. *Coates*, 756 F.2d at 552. As the Seventh Circuit has explained,

> [A]n employer should not be able to offer its affirmative action policy before the trier of fact as a manifestation of nondiscrimination and at the same time be able to hide self-critical evaluations that may undercut the employer's portrayal of its efforts. Fairness requires that the qualified privilege not be allowed to mask discrimination when the overall policy behind the privilege is directed toward eliminating it.

Coates, 756 F.2d at 552. Thus, facilitating one-sided presentation of a defense prevents the factfinder from getting "the full picture" of a defendant's conduct by precluding the plaintiff from enjoying a fair opportunity to challenge the evidence and the defendant's theory in offering it. *Cf. Yatvin v. Madison*

Metro. School Dist., 840 F.2d 412, 415 (7th Cir.1988)("just as the establishment of a bonafide affirmative action plan might help rebut a claim of sex discrimination . . . so the violation of such a plan might help support such a claim" (citation omitted)). Here, the district court exempted from discovery relevant self-critical materials thus leaving the EEOC ill-equipped to effectively cross-examine those of GenTel's witnesses who testified concerning the implementation and efficacy of GenTel's equal opportunity efforts. Thus, the district court erred in admitting GenTel's equal opportunity evidence.

Furthermore, it is clear from the decision issued by the district court that the EEOC was prejudiced by this error. Fifteen of the court's fifty-three findings related to GenTel's equal opportunity programs and policies. Moreover, of all of the exhibits and testimony presented by GenTel at trial, the court discussed this evidence in a vastly more detailed manner than any other genre of GenTel's evidence. Since the court's judgment was based in primary part on this evidence, the court's admission of the evidence was prejudicial error.[5] We therefore hold that the district court abused its discretion by admitting GenTel's equal opportunity evidence, once it had exempted GenTel's self-critical material from discovery.

B.

The EEOC also contends that the district court erred in assessing its statistical data. The court held that (1) in general, none of the EEOC's statistical studies sufficiently proved discrimination, and (2) more specifically, the EEOC's statistical analyses contained various "critical flaws" including the failure to adequately account for differences in job interest among men and women. These determinations regarding the EEOC's statistical analyses mirror the criticisms GenTel made

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[5] This case is thus in contrast with *Coates* wherein the Seventh Circuit found that the district court's error was not prejudicial due to the weight and abundance of other, independent evidence of nondiscrimination. *See* 756 F.2d at 552.

of the EEOC's data at trial. The court's findings and conclusions as to the probative value of this evidence, however, are not supported with any explanation of how adequately adjusting for the alleged flaws would have eliminated the disparities shown in the EEOC's statistical analyses. This appears to be because GenTel never offered any such evidence. Thus, the EEOC challenges the court's determinations regarding its statistics in claiming that it proved, through statistics and evidence of specific instances, that GenTel had impermissibly discriminated against women in hiring.

While this circuit has not yet addressed precisely what kind of evidence will overcome the probative force of a plaintiff's statistical evidence, decisions of the Supreme Court and other circuits have given us guidance.

1.

Bazemore v. Friday, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), is the Supreme Court's most relevant discussion of the validity of statistical studies in the form of regression analyses. In *Bazemore*, the Court stated that "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty. . . ." 478 U.S. at 400, 106 S.Ct. at 3009 (Brennan, J., concurring for a unanimous court).[6] The Court also rejected the Fourth Circuit's holding that an analysis which accounts for the major factors in an employment decision "must be considered unacceptable as evidence of discrimination," merely because some variables have been omitted, *id.* at 399-400, 106 S.Ct. at 3008 (quoting *Bazemore v. Friday*, 751 F.2d 662, 672 (4th Cir.1984)), since "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case." Id. 478 U.S. at 400, 106 S.Ct. at 3009.

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[6] The Court issued a per curiam opinion stating that it reached some of its holdings--including those relevant to this opinion--"for the reasons stated in the opinion of Justice Brennan. . . ." 478 U.S. at 386, 106 S.Ct. at 3002. We adopt the practice of other circuits, and take Justice Brennan's concurring opinion on these issues as having the force of a unanimous, majority opinion of the court.

Since *Bazemore*, several circuits have applied the principles articulated in that decision when addressing the use of regression analyses to prove discrimination. The majority of those courts have concluded that *Bazemore* requires that the defendant do more than simply point out possible flaws in the proponent's statistical analyses in order to rebut the inference of discrimination raised by the statistical evidence.

In *Sobel v. Yeshiva Univ.*, 839 F.2d 18 (2d Cir.1988), the Second Circuit addressed the use of regression analyses to prove a claim of gender-based wage discrimination at a university medical school. The court rejected the University's bare contention that the plaintiff had left out several important variables that would explain some of the disparity in salary which the plaintiffs' experts had attributed to gender discrimination. *Id.* at 34. The court found that the University did not show that the apparent gender disparity would in fact be reduced if these variables were taken into account. It then found that the University's experts had "simply criticized plaintiff's failure to include [the variables], offering no reason, in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient." *Id.*; *cf. Bazemore*, 478 U.S. at 403 n. 14, 106 S.Ct. at 3010 n. 14 ("Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of--statistical or otherwise--to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites.") (emphasis added).

The Second Circuit then held that *Bazemore* "require[s] a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis." 839 F.2d at 34; *see also Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 (2d Cir.1986) (holding that trial court abused its discretion in

rejecting plaintiffs' statistical table "on the speculative basis that the table's results might 'possibly' have been different" if an unaccounted-for factor had been included.).[7]

Sobel is consistent with earlier holdings of the District of Columbia and Eighth Circuits. Those courts also concluded that under *Bazemore* a defendant cannot overcome a strong statistical showing of discrimination merely by making an unsubstantiated assertion of error.

In *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir.1987), the District of Columbia Circuit found that

> [i]mplicit in the *Bazemore* holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the

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[7] A few days after *Sobel*, the Second Circuit issued its decision in another Title VII case, *Sheehan v. Purolator, Inc.*, 839 F.2d 99 (2d Cir.1988). The trial court in that case had denied class certification and dismissed individual plaintiffs' Title VII sex discrimination claims after a bench trial.

The plaintiffs had used statistics in an attempt to show disparities in salary, job titles and fringe benefits. The statistics, however, had not accounted for differences in education, prior work experience or job level--nondiscriminatory factors, at least the last of which quite obviously could have impacted the disparities in plaintiffs' statistics and thus were essential to a significantly probative study. As a result, the circuit court agreed with the district court that the statistics were not very probative of the alleged discrimination. *Id.* at 103; *see also Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir.1987) ("there may be a few instances in which the relevance of a factor to the selection process is so obvious that the defendants, by merely pointing out its omission, can defeat the inference of discrimination created by the plaintiffs' statistics."); *but see Mister v. Illinois Cent. Gulf R.R. Co.*, 832 F.2d 1427, 1431 (7th Cir.1987), *cert. denied*, ____U.S.____, 108 S.Ct. 1597, 99 L.Ed.2d 911 (1988) (refusing to discount plaintiff's statistics despite significant defects because the employer failed to raise those defects when attacking those statistics at trial).

> inference of discrimination created by plaintiffs' statistics. . . . [I]n most cases a defendant cannot rebut statistical evidence . . . without introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion.

Id. at 101 (footnote omitted); *see also Segar v. Smith*, 738 F.2d 1249, 1287 (D.C. Cir.1984), *cert. denied sub nom., Meese v. Segar*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) ("Absent such evidence [that purported flaws explain disparities], we are left . . . with mere speculation and conjecture."); D. Baldus & J. Cole, Statistical Proof of Discrimination, vii (1987 Supp.) (when statistical evidence is challenged on methodological grounds, the burden should be on the challenger to present evidence that the statistics are defective and how that flaw biases the results).

The Eighth Circuit reached a similar result in *Catlett v. Missouri Highway and Transp. Comm'n.* 828 F.2d 1260 (8th Cir.1987), *cert. denied*, ____U.S. ____, 108 S.Ct. 1574, 99 L.Ed.2d 889 (1988). That case involved successful class and individual claims of sex discrimination in the state's hiring of highway maintenance workers. The class had presented statistics showing a substantial disparity between the number of women in the relevant work force and the number hired by the state during relevant time periods. The court held that "[w]hile *Missouri* argues that the class in defining the relevant work force failed to consider the actual interest of otherwise qualified men and women in maintenance work, *Missouri* bore the burden of introducing evidence to show this failure was significant. . . ." *Id.* 828 F.2d at 1266; *see also Sobel*, 839 F.2d at 35 ("In short, the simple fact of imperfection, without more, does not establish that plaintiffs' model suffers from underadjustment, even though men score higher on the proxies.").

The only other circuit which has considered the issue is the Seventh Circuit in *Equal Employment Opportunity Com-*

mission v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir.1988). *Sears* involved claims of sex discrimination in hiring, promotions, wages, and the availability of paid pregnancy leave. At trial, the EEOC relied primarily on regression analyses based on information obtained from Sears. Sears did not present its own regression analyses, but instead offered evidence intended to undermine the two assumptions it claimed lay at the foundation of the EEOC's statistical analyses: that men and women had equal interests and equal qualifications for commission sales positions. *Id.* at 312-13. The district court concluded that the EEOC's statistical studies were "virtually meaningless" because they failed, inter alia, to adequately capture differences in male and female interests and qualifications. *Equal Opportunity Employment Commission v. Sears, Roebuck & Co.*, 628 F.Supp. 1264, 1305 (N.D.Ill.1986).

The Seventh Circuit affirmed the district court's conclusion, holding that the court's findings regarding the EEOC's statistical evidence were not "manifestly erroneous". 839 F.2d at 310 (relying on *Soria v. Ozinga Bros.*, 704 F.2d 990, 995 n. 6 (7th Cir.1983).[8] Dissenting from the majority's statistical discussion, Judge Cudahy criticized the majority for uncritically accepting the defendant's unsupported contention that differences in job interests and other subjective qualities would account for the huge statistical disparities observed between rates of hiring of men and women. He argued that by accepting the defendant's contentions, the majority had placed an unreasonably heavy burden on the plaintiffs by requiring

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[8] Judge Cudahy, concurring in part and dissenting in part, attacked the district court and majority's acceptance of the "interest" defense as offered by Sears, "without recognition of its close parallel to the stereotypes that Title VII seeks to eradicate . . ." *Id.* at 362.

them to "disprov[e] the enormous significance that *Sears* attributes to unmeasurable variables." *Id.* 839 F.2d at 363 (emphasis in original).[9]

We agree with the dissent and reject the approach taken by the *Sears* majority which places a very heavy--and possibly insurmountable--burden on the plaintiff with respect to establishing the probativeness of proffered statistical data. *See id.* at 363, 365. Moreover, the *Sears* majority opinion is at odds with the holdings of the District of Columbia, Second, and Eighth Circuits, which we find to be more persuasive. We also find those holdings to be more in keeping with the Supreme Court's reasoning in *Bazemore*, and with the general rules of procedure held by the Supreme Court to be most consistent with the purpose of Title VII. We therefore adopt the reasoning in those cases, i.e., that the defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics.

We note that our approach to regression analyses in Title VII litigation does not conflict with this circuit's earlier treatment of such statistical evidence in *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458 (9th Cir.1987). In *Penk*, women faculty members brought a Title VII action challenging the salary, promotion, and tenure practices of the Oregon state system of higher education. In support of their claims, plaintiffs offered multiple regression analyses to show a pattern and practice of discrimination "at every institution in every year studied in pay, rank, and tenure decisions." *Id.* at 464. Defendant Oregon State Board of Higher Education rebutted plaintiffs' proffered statistical evidence by offering its own statistical evidence and by challenging the "accuracy and importance" of plaintiffs' evidence. *Id.* While the district court

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[9] The dissent also noted that the majority opinion seemed to require proof that a plaintiff's statistical data is perfectly adjusted for all significant measurable and immeasurable variables, before the burden of proof shifts to the defendant to provide a nondiscriminatory explanation for the statistical disparity. *Id.* at 363.

admitted plaintiffs' multiple regression evidence, it later chose to discount the weight of that evidence during its deliberations following the bench trial. In its memorandum decision, the court held that plaintiffs' statistical analyses omitted or inadequately represented several critical decision-making variables, such as teaching quality, community and institutional service, and quality of research and scholarship. *Id.* at 465. In concluding that the plaintiffs had failed to establish intentional discrimination, the court emphasized that these missing variables "must have had a significant influence on salary and advancement decisions." *Id.*

Our decision in *Penk* is easily distinguished from this case because the statistical flaws in *Penk* were of a substantially different character than the alleged flaws in the EEOC's regression analyses. In *Penk*, the plaintiffs' regression analyses failed to account for arguably the most critical factors in academic promotion and tenure decisions--the subjective variables of teaching quality, community and institutional service commitment, and research and scholarship quality. *Id.* at 464 (academic and professional employment advancement decisions properly include a "high regard for subjective personnel qualities and characteristics"); *see also Zahorik v. Cornell University*, 729 F.2d 85, 92-94 (2nd Cir.1984). Thus, it is clear that the statistical omissions in *Penk* were so central to academic employment decisions that the defendants, by merely pointing out such omissions, could defeat any inference of discrimination. *See Sheehan*, 839 F.2d at 103; *Palmer*, 815 F.2d at 101. The alleged flaws in the EEOC's regression analyses in this case, on the other hand, concern the failure to account for gender-based differences in career interests. While failure to include such employment interests may render the regression analyses less precise, merely pointing to such an imperfection does not, without more, defeat a showing of intentional discrimination established by the regression analyses. *See Catlett*, 828 F.2d at 1266 (mere assertion by defendant that plaintiff's statistical analysis failed to account for gender-based

interest differences in highway maintenance positions did not defeat inference of discrimination; employer bore burden of introducing evidence to show omission was significant).

2.

The record in this case shows that the district court did not properly assess the probative value of the EEOC's evidence in light of GenTel's attacks upon it. Once the EEOC had introduced its statistical studies and other evidence, GenTel countered in two ways: (1) by attacking the EEOC's statistics; and (2) by offering its own evidence of nondiscrimination.

a.

In its Findings of Fact, the district court adopted GenTel's assertions and made a generalized finding that the EEOC's statistical analyses failed to establish impermissible discrimination because they contained various "critical flaws"--the most significant being the failure to adequately analyze differences in job interest between men and women and how this affects job placement.[10] However, as noted above, GenTel was required to do more than simply point out possible flaws in the EEOC's data to overcome the statistical showing of discrimination.

The EEOC offered regression analyses which showed a disparity in hiring that correlates with sex, while controlling for the major legitimate factors, raising a strong inference of discrimination. GenTel cannot defeat that showing of discrimination simply by pointing out possible flaws in EEOC's data. Rather, GenTel had to produce credible evidence that curing the alleged flaws would also cure the statistical disparity--proof which GenTel did not offer. Thus, we hold that the district court erred in uncritically accepting GenTel's assertion that the plaintiff's analyses were flawed where GenTel had failed to

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[10] The failure to adequately account for differences in interest and its affect [sic] on job placement is the only "flaw" mentioned specifically by the district court.

show that if the EEOC had "adequately" accounted for the alleged flaws, the disparities in its analyses would have been eliminated. *See Sobel*, 839 F.2d at 34; *Catlett*, 828 F.2d at 1266; *Palmer*, 815 F.2d at 101; *Segar*, 738 F.2d at 1287. The court's error is harmless, however, unless it also erred in its conclusion that GenTel's own evidence overcame any inference of discrimination raised by the EEOC's evidence.

b.

GenTel's affirmative defense consisted of three types of evidence: its own regression analyses; testimonial and documentary evidence of its equal opportunity efforts; and statistics comparing the percentages of women in craft positions in the Northwest and in the entire United States. The district court found that GenTel's statistics established a correlation between job interests and placement sufficient to dispel any inference of discrimination created by the EEOC's analyses. The court rendered this determination because although it acknowledged that GenTel's statistical data had limited probative value by itself,[11] its conclusions "were reinforced by other testimony and exhibits received at trial."

That "other testimony and exhibits," however, consisted in primary part of the self-laudatory evidence of GenTel's equal employment opportunity policies and programs--the admission of which we have held was error. With only a one-sided view of GenTel's equal employment opportunity efforts, it is not surprising that the district court found the

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[11] The district court noted, for example, the fact that some of GenTel's most relevant data were based on skewed labor pools: pools composed only of those applicants actually hired, rather than of all applicants. The court also noted that GenTel had excluded from bid flow analysis certain portions of the bid data. The bid flow analyses were central to GenTel's defense that women lacked interest in the higher-paying positions because it asserted that whenever an individual was interested in an open position, that individual would bid for the position.

conclusions of GenTel's questionable statistical analyses to be corroborated.

Other evidence which the court found substantiated GenTel's statistical conclusions showed that GenTel's record of employing women compared favorably to figures for the Northwest and the nation as a whole. The court did not rely heavily on this evidence, however, because it recognized that while offering some insight, the comparative evidence "do[es] little to assist us in understanding whether women were precluded from higher paying jobs at General Telephone. . . ."

As the district court itself recognized, GenTel's non-equal opportunity evidence has limited probative value. Thus we are unable to agree with the court's conclusion that GenTel overcame any inference of discrimination created by the EEOC's evidence, when considered in light of only the properly admitted evidence.

C.

In its cross-appeal, GenTel alleges that the charge of one of the named plaintiffs, Terry Freeman, was not timely filed with the EEOC and therefore cannot serve as a foundation for jurisdiction. GenTel argues that the EEOC thus failed to comply with certain jurisdictional requirements necessary for the court to try those EEOC claims which involved allegations of gender discrimination in the promotion of hourly-based workers in several job classifications. The EEOC contends that the Freeman charge was in fact timely filed, and even if it was not, there were other charges which provide adequate bases for the court's jurisdiction over the claims. Although this claim was made below in a motion to dismiss and renewed in the pretrial conference order, the district court never made a determination as to the timeliness of the Freeman charge.

A determination, however, must be made on this question before a decision can be made as to the merits of these particular claims. Because the record is inadequate for this court to assess the timeliness of the Freeman charge, we remand to the district court to make the proper inquiries and render the

necessary determination as to whether the jurisdictional requirements of the relevant causes of action have been met.[12]

CONCLUSION

The district court failed to assess properly the probative value of the EEOC's statistical evidence, in light of GenTel's opposing evidence. We cannot determine how the district court would have ruled with regard to the EEOC's ultimate burden of persuasion if it had accorded proper treatment to the statistical evidence. In addition, the district court erred in admitting the affirmative action evidence after denying discovery of critical self-assessments.

Accordingly, our previous disposition is withdrawn and vacated, the decision of the district court is REVERSED and the case REMANDED to the district court for a new trial.[13]

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12 In making its determination, the district court should be mindful that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982) (footnote omitted).

13 GenTel's cross-appeal also asserts that the district court abused its discretion in refusing to retax its award of costs to include an additional $425,690.35 in expert witness fees. Because we reverse the judgment of the district court and remand for a new trial, GenTel is no longer the prevailing party and thus no longer entitled to fees and costs.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
Plaintiff,	)	
vs.	)	**No. C77-247C**
GENERAL TELEPHONE COMPANY, et al.,	)	
Defendants.	)	

TRANSCRIPT OF THE ORAL OPINION of the Honorable John C. Coughenour, Judge of the United States District Court, rendered in the above-entitled and -numbered cause, 10:30 o'clock a.m., August 16, 1985.

THE COURT: I had my clerk call yesterday because I am prepared to deliver a decision at this time. I apologize for the amount of time that this has taken. I am a little embarrassed by it, but I had been counting on the summer to give me some time without trials. It didn't work that way until this week. That was the first time I could really get some time available to get my thoughts together.

This is a Title VII sex discrimination class action brought by the Equal Employment Opportunity Commission against

General Telephone Company of the Northwest and its wholly owned subsidiary West Coast Telephone Company of California, Inc.

The case has had, to say the least, a long and tortured history which has taken it to the Ninth Circuit Court of Appeals, the United States Supreme Court, and through a lengthy trial. There are over 30 volumes of pleadings which consume several shelves of file cabinets in the Clerk's office. The Pretrail [sic] Order alone is 437 pages in length and identifies 288 witnesses and over 1500 exhibits.

Trial was originally expected to consume up to six months of court time. At the suggestion of the Court, it was agreed that much of the trial time could be avoided by permitting the Court to read deposition transcripts as a supplement to, or in lieu of, live testimony of many witnesses. As part of this process, the Court read approximately 9,000 pages of deposition transcripts and witness summaries (a stack approximately nine feet high), with several thousand pages of related exhibits, plus 276 pages of trial briefs. Thus abbreviated, the trial still consumed 19 days.

The time frame of the claims in issue covers the period from the beginning of 1970 through 1980. The geographic scope includes all of defendant's facilities in Washington, Oregon, Idaho, Montana and California. During this period, Defendant had approximately 27,000 hires, transfers and promotions, all of which are, in a sense, challenged by Plaintiff. The company's work force almost doubled in the 1970's to approximately 8,400 employees.

Both parties agree that this is not an equal pay case, nor does Plaintiff contend that the overall number of women hired by Defendant is indicative of sex discrimination.

Rather, Plaintiff's major contention is that women were discriminatorily excluded from higher paying job categories. Plaintiff contends that a number of Defendant's hiring and promotion practices, many of which were allegedly subjective, permitted or were used to accomplish this discrimination.

Defendant argues that a central issue in the case is whether Plaintiff's claims must be analyzed under a disparate treatment, as opposed to disparate impact, model. While the parties agree that the analysis differs under these two theories, Plaintiff contends that both theories are appropriate for its claims. Defendant argues that only the disparate treatment theory is applicable.

In a disparate treatment case, plaintiff bears the burden of proving intentional discrimination. Plaintiff's initial burden in a class disparate treatment case is to make a prima facie showing that as a regular pattern or practice, Defendant discriminated on the basis of sex. This is generally done by evidence of statistical disparities, supplemented by so-called anecdotal testimony. Once a prima facie showing is made by Plaintiff, the burden shifts to Defendant to rebut the inference of discrimination.

The inquiry in a disparate impact analysis is whether a facially neutral employment policy, which is applied uniformly to all individuals and which has no business justification, has a discriminatory effect. In a disparate impact case, once the Plaintiff establishes a prima facie case of discrimination, the Defendant will be held liable unless it can rebut Plaintiff's statistics or show that the practice has a business justification. Even if Defendant makes such a showing, Plaintiff may still prevail if he can show that the employment practice is a mere pretext for discrimination. At the risk of over-simplification, it may be said that the disparate impact theory permits the substitution of a showing of a policy with a necessarily discriminatory impact for the showing of intent required by the disparate treatment theory.

Defendant contends that Plaintiff's claims in this case may not be analyzed under the disparate impact theory because they amount to a broadscale attack on Defendant's employment practices rather than focusing on a particular employment policy, and because they are largely a challenge of the alleged subjectivity of Defendant's hiring and promotion policies.

Plaintiff's trial brief at page 36 lists the challenged policies as (1) word-of-mouth recruitment, cronyism and nepotism; (2) reliance on non-job-related selection criteria such as participation in organized sports and military service; (3) failure to post openings for traditionally male jobs in the traditionally female Traffic Department; (4) failure to inform employees about qualifications for transfer to traditionally male jobs; (5) discretion of supervisors to provide grooming and cross-training for potential promotions; (6) supervisory discretion to hire male supplemental employees who obtain seniority rights for bidding into traditionally male jobs; and (7) the lack of uniform and objective criteria for making hiring and promotion decisions. At trial, Plaintiffs also alleged that Defendant had a decentralized hiring and promotion system which allowed low-level male supervisors to exercise largely unfettered discretion, which resulted in women being denied access to higher paying jobs.

The Court agrees with Defendant that these claims cannot be properly analyzed under an "impact" approach. The broad-based attack of Plaintiffs would, under the impact approach, place an impossible burden upon Defendant to prove a business justification for a wide range of hiring practices. More importantly, Plaintiff's challenges are largely directed at the allegedly discretionary or subjective hiring and promotion practices. But in a "subjectivity" case, there is no specific employment practice of policy such as a test or educational requirement which the employer can establish is job related. Moreover, essentially all hiring and promotion decisions involve some elements of subjectivity. If excessive subjectivity of employment practices were sufficient to trigger an impact analysis, this would mean that plaintiffs in such cases would be relieved of the necessity of a showing of intentional discrimination and, by merely waiving the shibboleth of subjectivity, could compel an employer to suffer liability, absent a showing of business justification, for each exercise of employer discretion.

I believe *Spaulding v. University of Washington*, 740 F. 2d 686, Ninth Circuit (1984) puts Plaintiff's claims in this regard to rest. I therefore hold that Plaintiff's allegations may only be analyzed under the disparate treatment model.

I hasten to add, however, that the end result in this case is not affected by this determination. This is because under both the treatment and impact analyses, Defendant may prevail if its statistical data rebuts Plaintiff's statistical evidence.

I, like the Ninth Circuit panel in *Spaulding*, am "sobered by warnings that statistical evidence has an inherently slippery nature." This case is no exception. At first blush, the statistical evidence of both sides seems irrefutable. Upon closer examination, all of the statisticians seemed to indulge in some forms of selective perception. However, after having carefully weighed the statistical evidence, I am left with the abiding conviction that Plaintiff's statistical approach, although a highly sophisticated regression analysis, had the most significant flaw. That is, it did not analyze in a meaningful way the extent to which the variable of career interests affected the placement of employees at General Telephone.

Defendant's studies, while also not perfect, seem to offer more insight into this question. Even recognizing the limitations in certain of Defendant's statistical analyses (such as using only applications of persons hired as opposed to all applications; and excluding from the bid flow analysis certain portions of the bid data), I still am persuaded that Defendant's statistics show a correlation between job interests and job placement at General Telephone, sufficient to dispel the inference of discrimination contained in Plaintiff's statistics.

There was also compelling evidence comparing the experience of women at General Telephone with the experience of women in similar jobs in the Northwest and the United States. Again, recognizing the limited value of these comparisons due to the lack of complete identity between job classifications, and also recognizing that these comparisons do little to assist us in understanding whether women were precluded from

higher paying jobs at General Telephone, one can still draw some insight from this data.

1. In 1970, 3.1% of all craft positions were held by women at General Telephone. In 1975, over four years later, women held 2% of all craft jobs in Washington transportation and public utilities industry.

2. Female representation in craft positions at General Telephone in 1976 had increased to 5.66% and was only 2.86% nationwide.

3. In 1977, women held 7.97% of all craft jobs at General Telephone, and only 6.56% of all craft jobs in Washington.

4. In 1978, women held 11.63% of the craft positions at General Telephone, and only 6.98% of the craft positions in the United States communications industry.

5. In 1979, women held 21.3% of the craft positions at General Telephone, and only 6.56% of the craft positions in all industries in Washington.

6. In 1976, 19% of all operative positions at General Telephone were held by women, and only 4.65% of the operative positions in U.S. public utilities were held by women.

7. In 1976, 29.09% of all technical positions at General Telephone were held by women, but only 23.64% of all technical positions were held by woman [sic] in the U.S. public utilities industry.

Viewed with appropriate caution, these numbers at least indicate that women may have limited interest in the craft and technical jobs which Plaintiff contends are the route to higher pay at General Telephone. The data also suggests that women at General Telephone were more successful than women in other companies in moving into this type of job.

Of couse, this is not to say that no women are ever interested in craft or technical jobs. Certainly the evidence in this case shows that many are, and that many women's career goals are identical to those of men. To those women, Title VII must be a guarantee of equal treatment. Title VII does not, however, require an employer to have equal numbers of men

and women in given job categories. It only requires that an employer not discriminate in making employment decisions. On the evidence in this case, I cannot conclude that Plaintiff has proven a pattern or practice of discriminatory exclusion of women from higher paying jobs.

I make this finding after having given careful consideration to the anecdotal testimony in this case. There was uncontroverted testimony of instances of off-color or inappropriate humor, which could most charitably be described as sexist. There was also uncontroverted testimony which, if accepted as true, would indicate that certain employees had valid individual claims for sexual discrimination and harassment. But this is a class action, and the question I must examine is whether Defendant has been shown to have engaged in a pattern or practice of discrimination. In the context of this case, where some 27,000 employment decisions are at issue, these anecdotes, however offensive, do not prove a pattern or practice of discrimination - even when considered in light of Plaintiff's statistical proof.

Lastly, I want to place special emphasis on the efforts that General Telephone has expended during the relevant time period to minimize the opportunity for discriminatory employment decisions. Although evidence of efforts on the part of the employer to reduce the opportunity for, or to discourage, discriminatory conduct is not, by itself, a defense to a charge of sex discrimination, it should be at least relevant to a determination of whether a pattern or practice of discrimination existed.

Throughout all or most of the relevant time period, the Defendant had a comprehensive affirmative action program which was audited on a quarterly basis, an equal employment opportunity policy, and an aggressive equal employment opportunity department.

Annual letters to all employees informed them of the company's affirmative action plan. The equal employment opportunity policy was regularly published in the company newspaper, employee bulletins, and the employee's handbook.

Outside recruiting sources were regularly and systematically advised of the affirmative action plan and equal employment opportunity policy.

From 1972 through the balance of the time period at issue, the equal employment opportunity director's position was held by Nell Fairbank. The Court found Ms. Fairbank to be an impressive witness with solid credentials, who took her responsibilities as EEO Director very seriously. By 1977, when this action was commenced, her office had ten or eleven employees, and by 1979 the number had risen to fifteen. Ms. Fairbank testified that she received total support from the Chief Executive Officer and Board of Directors of the company from both a policy and budget standpoint. She testified that management never overturned a recommendation of her office nor attempted to discourage a recommendation.

The Chief Executive Officer of the company told Ms. Fairbank that she could have whatever it took in staff and budget to do the job. He also told her that the EEO Director's budget was never to be cut, even when other budgets were cut in period of financial difficulty.

One of the major responsibilities of this office was to audit employment decisions to make certain all documentation was present and, if a woman was on the candidate list but not given the job, to confirm that the reasons for selection were nondiscriminatory.

I would again emphasize that the existence of this office and the policies described above are not an absolute defense to a claim of discrimination. Still, in the view of this Court, this evidence most certainly sheds some light upon the question of whether Defendant intentionally discriminated against women.

In conclusion, I find that Defendant has sufficiently rebutted the inference of discrimination created by Plaintiff's statistical and anecdotal testimony to prevail under either a disparate treatment or disparate impact theory.

I direct that Defendant prepare proposed findings and conclusions - concise in form - within ten days of today. Plaintiff shall file objections thereto within five days thereafter.

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**NO. C77-247C**
Plaintiff,	)	**Entered**
vs.	)	**Oct 18 1985**
	)	**Clerk U.S. District Court**
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,	)	**Western District of Washington**
Defendants.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THIS MATTER was tried to the undersigned, sitting without a jury, from April 8, 1985 through May 2, 1985. Plaintiff, Equal Employment Opportunity Commission, appeared through its attorneys, Michael Reiss, Hollis R. Hill, Stephen M. Randels and Marcia Ruskin. Defendants, General Telephone Company of the Northwest, Inc. and West Coast Telephone Company of California (hereinafter "GTNW"), appeared through their attorneys, James R. Dickens, C. Lee Coulter, Richard J. Omata and William H. Beaver.

The EEOC listed over 150 potential witnesses and General Telephone listed over 130 potential witnesses in the pretrial order. The Court heard testimony from a substantial number of these witnesses either by deposition or live at the time of trial, plus additional witnesses called in rebuttal. The

Court also heard the testimony of EEOC expert witnesses Lee E. Edlefsen, Ph.D., and Mark R. Killingsworth, Ph.D., and GTNW's expert witness, J. Stuart McMenamin, Ph.D. Over 1,000 exhibits, totaling several thousand pages, were listed in the pretrial order, and a substantial number were offered in evidence. The Court announced its decision on August 16, 1985, after consideration of the testimony, exhibits and argument of counsel.

FINDINGS OF FACT

On the basis of the foregoing testimony and exhibits, and having heard the argument of counsel, the Court finds:

1. Sections I, II, III and IV of the pretrial order dated February 3, 1983, to which the parties have agreed and have admitted as facts, are incorporated herein as to the same extent as fully set forth.

2. Throughout the relevant time period, which was January 1, 1970 to June 30, 1980, GTNW had a written policy of prohibiting discrimination (based on sex, race and other protected categories) in all aspects of employment.

3. The president and chief executive officer of GTNW from 1967 to 1979 was Alfred J. Barran. He was strongly committed to equal opportunity for all company employees.

4. GTNW made several commitments prior to 1972 to reflect the company's emphasis on equal employment opportunities, including selection of a company equal employment opportunity representative and an equal employment opportunity coordinator in 1970 whose responsibilities related exclusively to equal employment opportunity work.

5. In 1972, Nell Fairbank became Equal Opportunity Administrator for GTNW, with responsibility for administering overall equal employment opportunity policy for the company.

6. In February 1973, GTNW's Personnel Department functions were realigned to further emphasize GTNW's commitment to equal employment opportunity. A new Equal Opportunity Department was created, the department head was

made a company director, and Ms. Fairbank was selected as Equal Opportunity Director.

7. Ms. Fairbank was the Equal Opportunity Director at GTNW from February 1973 throughout the balance of the relevant time period. She was a credible witness with solid credentials who took her responsibilities as Equal Opportunity Director very seriously.

8. GTNW President Alfred J. Barran promised Ms. Fairbank when she accepted the position of Equal Opportunity Director that she could have the appropriate staff and budget to handle the necessary responsibilities of that position. She also was promised that her department budget would never be cut. This promise was kept even when other department budgets were cut in periods of financial difficulty for GTNW.

9. President Barran and the GTNW Board of Directors supported Ms. Fairbank completely in pursuing her duties as Equal Opportunity Director. No recommendation from Ms. Fairbank's Equal Opportunity Department was ever overturned by another member of management or the company president, nor did any of them ever discourage a recommendation from Ms. Fairbank's Equal Opportunity Department.

10. By 1977 the Equal Opportunity Department directed by Ms. Fairbank had about 10 employees, and by 1979 the number had increased to 15.

11. GTNW prepared comprehensive written affirmative action plans throughout the relevant time period, and responsibilities under those affirmative action plans were discussed at least annually with managers at all levels of the company. The GTNW affirmative action plan was audited internally on a quarterly basis by the GTNW Equal Opportunity Department.

12. The higher paying hourly jobs from which plaintiff alleged women had been excluded were listed in Exhibit A to plaintiff's Third Amended Complaint, dated February 8, 1982. They included jobs in the three highest hourly pay

groups 7, 8 and 9, which were primarily the following jobs (or their predecessor titles): group 7 (installation and repair technician, garage mechanic II, over-the-road driver, cable technician, and supply specialist); group 8 (field technician, special apparatus technician, testboard operator, cable splicer, garage mechanic I, and facilities technician); and the highest hourly pay group, group 9 (equipment technician, central office equipment installer, shop technician I, and special apparatus technician). Plaintiff also contended women had been excluded from selected job titles in the hourly pay groups 4, 5 and 6, to include supply specialist I, supply specialist II, garage helper, graphics specialist, and pay station collector. Most of these hourly jobs at issue fell into the "craft" category for occupational categories under the Census data, although some hourly jobs at issue were in the "operative" category or "technician" category.

13. The higher paying salaried pay levels and/or positions within pay levels (hereinafter "higher paying salaried jobs") from which plaintiff alleged women had been excluded were listed in Exhibit B to plaintiff's Third Amended Complaint. From 1970 through April 1974 plaintiff alleged women were excluded from salaried pay levels 1 through 3 and from certain positions within salaried pay levels 4 through 6. From April 1974 through the end of the relevant time period, plaintiff alleged women were excluded from salaried pay levels 7 and above and from certain positions within salaried pay levels 3 though 6.

14. GTNW's Equal Opportunity Department was aggressive in seeking women for positions in the higher level (and higher paying) hourly jobs and higher level (and higher paying) salaried jobs. It also assisted area management personnel in identifying female applicants or female employees interested in positions in the higher level hourly jobs or higher level salaried positions.

15. GTNW took frequent action every year to advise all employees of the company's equal opportunity policy.

These actions included annual letters to all employees advising them of the company's affirmative action plan; regular publication of the company's equal employment opportunity policy in company newspapers, employee bulletins and employee handbooks; and advising outside recruiting sources of the company's equal employment opportunity policy and its desire for female candidates for jobs in the higher paying hourly job groups and higher paying salaried jobs.

16. The Equal Opportunity Department audited employment decisions throughout the company in an effort to ensure that equal opportunity existed for female candidates and other employees, to ensure that appropriate documentation was present when an employment decision was made, and to confirm that the selections of job candidates were for non-discriminatory reasons.

17. The Equal Opportunity Department, along with area management personnel, developed specific programs in different locations to assist women who might be interested in going into those higher paying hourly jobs and higher paying salaried jobs in which they traditionally had shown little interest. These included cross-training programs, pole climbing classes specifically for women or in which women were given special consideration, overview programs designed to inform women about higher paying hourly jobs at GTNW, and tuition aid for continuing education.

18. Throughout the relevant time period, employees at GTNW were provided the opportunity to express their interest in positions in advance of openings through the completion of self-interest statements (sometimes called skill cards or other names) which were sent at least annually to all employees to complete and on which they could indicate the jobs in which they were interested.

19. Throughout the relevant time period from 1970 to 1980, except for certain jobs covered by Career Planning from 1974 to 1976, GTNW policies required that openings in hourly jobs (except for the lowest wage group) be posted for bid by

interested employees in accordance with either applicable collective bargaining agreements and/or company policy.

20. Management requisitions were prepared whenever openings occurred in salaried jobs.

21. Management requisitions were routed to certain management employees during the period 1970 to 1973. These managers then posted the management requisitions on department bulletin boards, or routed them among employees, or kept them in a notebook available to employees, or discussed them during meetings with supervisors, or otherwise made employees aware of the management openings. After 1973, these procedures continued but GTNW adopted a policy of posting notice of management openings on bulletin boards throughout the company and advertising them in company newspapers.

22. In 1974, as part of the Career Planning program, the Equal Opportunity Department prepared and distributed to all employees a pamphlet entitled "Career Planning - Job Planning Guide" which contained a description of all hourly jobs, instructions on how to apply for hourly jobs, the geographical and department location of hourly jobs, frequency of different hourly job openings and basic job terms.

23. GTNW had job descriptions for all hourly jobs and all salaried jobs throughout the relevant time period, and these job descriptions were available for review by interested employees.

24. Ms. Fairbank and other representatives of the Equal Opportunity Department traveled throughout GTNW several times each year discussing the company's equal employment opportunity policy and encouraging women to apply for the higher level (and higher paying) hourly positions and higher level (and higher paying) salaried positions, and particularly urging them to apply for jobs with low percentages of women.

25. Any complaints by female employees of alleged discrimination because of sex which were brought to the

attention of Ms. Fairbank or her department were promptly investigated and appropriate action was generally taken.

26. Some male and some female supervisors at GTNW actively encouraged female employees to apply for any higher paying hourly or higher paying salaried jobs in which they were interested, particularly jobs with low percentages of women.

27. Except for isolated incidents, female employees were not discouraged by GTNW from applying for any jobs in which they were interested.

28. GTNW employed numerous checks and balances in an effort to ensure that employees selected for job openings were the most qualified.

29. Plaintiff alleged that GTNW engaged in certain policies and contended these policies were improper. The challenged policies were primarily discretionary or subjective and included (1) word-of-mouth recruitment, cronyism and nepotism; (2) reliance on non-job-related selection criteria such as participation in organized sports and military service; (3) failure to post openings for traditionally male jobs in the traditionally female Traffic Department; (4) failure to inform employees about qualifications for transfer to traditionally male jobs; (5) discretion of supervisors to provide grooming and cross-training for potential promotions; (6) supervisory discretion to hire male supplemental employees who obtained seniority rights for bidding into traditionally male jobs; (7) the lack of uniform and objective criteria for making hiring and promotion decisions; and (8) a decentralized hiring and promotion system which allowed low-level male supervisors to exercise largely unfettered discretion, which resulted in women being denied access to higher paying jobs. Plaintiff failed to prove that any of these policies, separately or in combination with any of the other challenged policies, was applied equally to all of the employment decisions at issue, or any defined subcategory of the employment decisions at issue.

30. Plaintiff failed to prove the challenged policies were actual policies of GTNW or ones for which GTNW was responsible.

31. Even if the challenged policies were GTNW policies, or ones for which GTNW was responsible, plaintiff failed to establish that any of these policies, separately and individually, caused a disparate impact on women which excluded them from any higher paying hourly jobs or any higher paying salaried jobs.

32. Even if the challenged policies were GTNW policies, or ones for which GTNW was responsible, plaintiff failed to establish that the cumulative effect of these policies as a group caused a disparate impact on women which excluded them from any higher paying hourly jobs or any higher paying salaried jobs.

33. The statistical studies and analyses presented by plaintiff's experts contained various critical flaws. The most significant flaw was the failure to analyze in a meaningful way the extent to which career interests differed between males and females, and the effect of these differences upon the placement of employees at GTNW.

34. The statistical studies and analyses presented by GTNW's expert, Dr. McMenamin, and other exhibits and testimonial evidence established a correlation between job interests and job placements at General Telephone which was sufficient to dispel any inference of discrimination contained in plaintiff's statistics and analyses. Although Dr. McMenamin's analysis was limited to data drawn from applications of people hired by GTNW, the conclusions he reached from this data were reinforced by other testimony and exhibits received at trial.

35. The patterns of jobs for which men and women in a sample of people hired by GTNW applied were statistically different at any reasonable level of significance.

36. Female employees had a much higher propensity to apply for clerical and operator positions than did males. For

outside hires, more than 90% of the applications for people hired by GTNW with a first job-applied-for in these categories were from females.

37. Male employees had a much higher propensity to apply for operative, garage mechanic and craft jobs than did females. For outside hires, more than 90% of the applications for people hired by GTNW with a first job-applied-for in the higher paying hourly jobs in the operative, garage mechanic, inside plant G8-G9, COE installer, service and construction categories were from males.

38. In analyzing the characteristics of employees according to the information provided on their external applications for jobs with GTNW (such as age, educational level and field of study, degree of flexibility and geographical mobility, types of training and amounts of work experience), the characteristics of males and females were significantly different in the substantial majority of comparisons. The analyses established that:

(a) Male hires had substantially higher concentrations of college degrees thanfemale hires.

(b) The educational fields of study by female hires were substantially more concentrated in the art, business and clerical areas than males, while male fields of study were substantially more concentrated in the engineering, math, science, craft and electronics categories.

(c) Female employees indicated a significantly greater willingness to work part-time or on call that males.

(d) Female employees of GTNW indicated significantly lower levels of geographic mobility than did males.

(e) Female employees had a significantly lower frequency of trade school and other training in electronic, mechanical, craft and engineering categories than did males.

(f) Male employees had substantially higher amounts of experience in the laborer, operative, technician,

craft, engineer, professional and official and manager categories than did females.

(g) A significantly larger concentration of male employees had military experience than females and many of the males also had obtained electronic experience and/or training during their tours of military service.

39. In analyzing the jobs for which external hires applied, and comparing them with jobs which these applicants obtained, the distribution of jobs that males and females obtained was virtually identical to the distribution of first jobs for which males and females applied.

40. The majority of external applicants who were hired obtained a job in the first category for which they applied, whether male or female.

41. GTNW did not exclude women from higher paying hourly jobs or higher paying salaried jobs at the time of hire.

42. GTNW did not channel women into certain jobs at the time of hire.

43. Male and female employees at GTNW, on average, had significantly different job interests and career interests.

44. Male and female employees at GTNW had equal opportunity to be considered for openings in all hourly positions and all salaried positions.

45. Male employees bid on hourly positions in the higher paying hourly jobs at a much higher bidding rate than did female employees.

46. Controlling for positions held, the patterns of jobs to which male and female incumbent employees bid was significantly different.

47. Males had a significantly higher propensity to bid for outside jobs in the installation and repair technician and construction categories than did female employees.

48. Controlling for the position from which internal candidates applied, the difference between the actual female

success rate and expected female success rate for the filling of higher paying hourly jobs was not statistically significant.

49. Female candidates represented the majority of applications to the clerical and operator supervisory category. Male candidates represented the majority of applications to operative and craft supervisory positions.

50. In comparing the percentage of female employees at GTNW in certain types of jobs such as "craft," "technical," and "operative," with the percentage of women in similar job groups in the Pacific Northwest and the United States, General Telephone consistently had higher percentages of females in these job groups than existed in the comparison groups. Such comparisons include:

(a) In 1970, 3.1% of all craft positions at GTNW were held by women. By comparison, in 1975 (over four years later) women held only 2% of all craft jobs in Washington's transportation and public utilities industry.

(b) By 1976 the female representation in craft positions at General Telephone had increased to 5.66%, but females only represented 2.86% of craft positions nationwide.

(c) In 1977, women held 7.97% of all craft jobs at General Telephone, but women only held 6.56% of the craft jobs in all industries in the State of Washington.

(d) In 1978, women held 11.63% of the craft positions at General Telephone, but only 6.98% of all craft positions in the communications industry throughout the the [sic] United States.

(e) In 1979, women held 21.3% of the craft positions at General Telephone, but only 6.56% of the craft positions in all industries in Washington.

(f) In 1976, 19% of all operative positions at General Telephone were held by women, but only 4.65% of the operative positions in the United States public utilities industry were held by women.

(g) In 1976, 29.09% of all technical positions at General Telephone were held by women, but only 23.64% of all technical positions were held by women in the public utilities industry in the United States.

51. There was some limited uncontroverted testimony which, if accepted as true, would indicate that certain employees might have individual claims for sex discrimination. However, during the relevant time period there were some 27,000 employment decisions. With 27,000 employment decisions the anecdotal incidents were too few to prove a pattern or practice of discrimination as alleged by plaintiff, even when considered in light of plaintiff's statistical proof.

52. Any differences between the numbers and percentages ofmen and women in the higher paying hourly jobs and higher paying salaried jobs at GTNW were not caused by any policy or practice of GTNW to exclude women from such jobs.

53. For the higher paying hourly jobs and higher paying salaried jobs, sex was not a factor in the selection of employees during initial hiring, or transfer, or promotion at GTNW.

CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact, the Court makes the following conclusions of law:

1. Defendant GTNW's policies challenged by the plaintiff may not be analyzed under the disparate impact theory for claims of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII).

2. Even if the disparate impact theory under Title VII was applicable to the challenged GTNW policies, plaintiff failed to establish a prima facie case under the disparate impact theory for any of the challenged policies, whether viewed individually or in combination with any other challenged practice or practices.

3. Even if the disparate impact theory under Title VII was applicable to the GTNW policies challenged by plaintiff,

either individually or in combination with any other challenged practice or practices, and even if plaintiff established a prima facie case, defendant GTNW's evidence sufficiently rebutted any inference of discrimination created by plaintiff's statistical and anecdotal evidence for defendant to prevail under the disparate impact theory.

4. Defendant GTNW sufficiently rebutted any inference of discrimination created by plaintiff's statistical and anecdotal evidence to prevail under the disparate treatment theory under Title VII.

5. Defendant GTNW did not engage in a company-wide pattern or practice of intentional discrimination in violation of Title VII by excluding women because of their sex from higher paying hourly jobs.

6. Defendant GTNW did not engage in a company-wide pattern or practice of intentional discrimination in violation of Title VII by excluding women because of their sex from higher paying salaried jobs.

7. Judgment should be entered in favor of defendant GTNW on all claims by plaintiff, and defendant should be awarded its statutory costs and other cost permitted for actions of this type.

The Clerk of this Court is directed to send uncertified copies of these Findings of Fact and Conclusions of Law to all counsel of record.

DATED this 18th day of October, 1985.

/s/
John C. Coughenour
United States District Court Judge

Appendix D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff-Appellant/ Cross-Appellee,	)	**Nos. 85-4422 85-4437 86-3732**
v.	)	**D.C. No. CV-77-247-C**
GENERAL TELEPHONE COMPANY OF NORTHWEST, INC.,	)	
Defendant-Appellee/ Cross-Appellant.	)	**Filed February 8, 1988 Cathy A. Catterson Clerk U.S. Court of Appeals**
	)	**MEMORANDUM***

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted June 2, 1987
Seattle, Washington

Before: POOLE, FERGUSON and CANBY, Circuit Judges

The Equal Employment Opportunity Commission (EEOC) alleged gender discrimination in employment against General Telephone Company of the Northwest (GenTel). The district court held that GenTel did not violate Title VII in that it did not discriminatorily deny its female employees access to higher paying positions.

After trying the case on the disparate treatment theory, the district court concluded that the EEOC had not shown a company-wide practice of intentional discrimination. Pursuant to federal statute, the district court awarded GenTel attorney's fees and costs.

The EEOC appeals the district court's decision on two grounds. First, that the district court erred by not finding general discrimination where fewer women than men were initially assigned to higher-paying jobs. Second, the EEOC argues that the district court erred in admitting evidence offered by GenTel of its affirmative action programs.

GenTel cross-appeals, claiming that the court erred in calculating the fees to which it is entitled. GenTel argues that the district court should have awarded it an additional $425,000 in costs for expert witness fees.

We affirm the decision of the district court.

I.

In Title VII cases, factual findings are reviewed under the clearly erroneous standard of review. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985); *Kimbrough v. Secretary of United States Air Force*, 764 F.2d 1279, 1281 (9th Cir. 1985). Evidentiary decisions are reviewed for abuse of discretion,

Kisor v. Johns-Manville Corp., 783 F.2d 1337, 1340 9th Cir. 1986), as are determinations regarding the award of expert witness fees, *Trans Container Services (BASEL) A.G. v. Security Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985).

II.

The EEOC makes two arguments on appeal. Each is considered in turn.

A.

The EEOC contends that it proved impermissible discrimination in initial hiring through evidence of specific instances and statistics. The EEOC's claim amounts to whether, in making its factual findings, the district court failed to give appropriate consideration to a specific statistical study which the EEOC claims reflects employee interest in certain higher-paying jobs at GenTel. This study was offered in addition to other statistical evidence that was presented at trial in support of the EEOC's discrimination claim.

It is well-established that it is the province of the district court to weigh evidence and make credibility determinations. The district court made no specific findings regarding the accuracy or credibility of this specific study. The court did, however, conclude generally that none of the EEOC's statistical studies sufficiently accounted for the diverse job interests of men and women, therein implying that he had considered all relevant evidence. There is not sufficient support in the record to find that the district court judge committed reversible error in reaching this conclusion.

B.

The EEOC also challenges the district court admission at trial of evidence offered by GenTel regarding its affirmative action efforts. The evidence did not include

self-critical material, as such material had been exempted from discovery for policy reasons. The EEOC argues that the admission was unduly prejudicial to its case. Moreover, it contends that the admission was improper because it had no opportunity to examine the self-critical assessments. This court has not previously ruled on the propriety of granting a qualified privilege barring certain affirmative action material from discovery in order to promote the goal of removing discriminatory practices from the workplace.

We decline to decide the issue here because even if the decision to admit the evidence was error, the district court's admission of the evidence would not amount to an abuse of discretion constituting reversible error. There are two principal reasons compelling this conclusion. First, there was an abundance of alternative evidence presented at trial which would support the judgment. Second, the district court's findings themselves indicate that the judgment was primarily based on determinations as to the relative value of the statistical (and other unchallenged) evidence offered by the respective parties. Thus, in light of the entire record, the district court did not commit reversible error by admitting this evidence.

III.

GenTel's cross-appeal asserts that the district court abused its discretion in refusing to retax its award of costs to include an additional $425,690.35 in expert witness fees. GenTel argues that this court should remand with instructions to include the additional amount on the ground that the district court was unaware that it had the power to tax costs in excess of those enumerated in 28 U.S.C. § 1821.

To support its request, GenTel asserts that, particularly in Title VII litigation, this court has applied a liberal rule for the award of expert witness fees in excess of those set forth in section 1821. However, case law in this circuit supports the opposite conclusion. *See, e.g., Thornberry v.*

Delta Air Lines, Inc., 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983). Thus GenTel has failed to demonstrate that the district court abused its discretion.[1/]

CONCLUSION

Accordingly, the decision of the district court is AFFIRMED.

1/ GenTel had one additional claim on appeal. If this court had reversed the judgment of the district court, GenTel would have required the resolution of certain factual issues to determine whether the district court properly asserted jurisdiction to hear the EEOC's action. Since we affirm the district court, we do not address this issue.

Appendix E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**Nos. 85-4422**
Plaintiff-Appellant/ Cross-Appellee,	)	**85-4437**
	)	**86-3732**
v.	)	**D.C. No. CV-77-247-C**
	)	**(W.D. Wash.)**
GENERAL TELEPHONE COMPANY OF NORTHWEST, INC.	)	
Defendant-Appellee/ Cross-Appellant.	)	**Filed**
	)	**March 6,1990**
	)	**Cathy A. Catterson**
	)	**Clerk U.S. Court**
	)	**of Appeals**
	)	
	)	**ORDER**

Before: POOLE, FERGUSON and CANBY, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Poole and Canby voted to reject the suggestion for a rehearing en banc and Judge Ferguson recommended the denial of the en banc request.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

No. 89-1900

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner defeated the inference of discrimination raised by a regression analysis accounting for the major factors in the employment decision merely by pointing to a variable that it argued was not sufficiently accounted for in that analysis.

2. Whether petitioner should have been allowed to introduce self-congratulatory evidence of its equal employment opportunity efforts without disclosing self-critical portions of that material.

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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-17a, is reported at 885 F.2d 575. The opinion of the district court, Pet. App. 27a-39a, is reported at 40 Fair Empl. Prac. Cas. (BNA) 1533.

JURISDICTION

The judgment of the court of appeals was entered September 12, 1989. The order of the court of appeals denying the petition for rehearing en banc was entered March 6, 1990. Pet. App. 45a. The petition for certiorari was filed June 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Washington, petitioner was found not to have violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The court of appeals unanimously reversed and remanded for a new trial.

1. Petitioner provides telephone and telecommunications services in Washington, Oregon, Idaho, California, and Montana. In 1977, the Equal Employment Opportunity Commission (EEOC) brought this pattern and practice sex discrimination suit based on numerous individual charges filed against petitioner. Among other practices, EEOC charged that petitioner systematically excluded women from higher-paying hourly jobs (including craft, technician, and operative positions) and from higher-paying salaried jobs. Pet. App. 2a, 19a, 25a, 29a-30a.[1]

2. In 1985, after years of extensive discovery, the case went to a four-week trial. Pet. App. 19a, 27a. EEOC presented statistical evidence, including regression analyses, which showed that women received significantly lower starting wages than men who had the same job preferences, experience, education, and personal characteristics (aside from gender). *Id*. at 14a, 19a. EEOC also presented testimony of witnesses who described company practices that deterred women from requesting, obtaining, and remaining in higher-paid hourly and management jobs. *Id*. at 2a, 19a, 24a, 27a, 33a.

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[1] Petitioner moved to dismiss the [illegible]s aspects of the suit on the ground that EEOC had not been certified as a class representative in accordance with Federal Rule of Civil Procedure 23. The district court denied petitioner's motion, and its order was affirmed by the Ninth Circuit, 599 F.2d 322 (1979), which in turn was affirmed by this Court, *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318 (1980).

In rebuttal, petitioner presented a regression analysis of its own which showed a correlation between job interest and job placement. Pet. App. 15a, 34a. Petitioner also presented, over EEOC's objection, extensive evidence of its equal opportunity efforts—evidence that included the testimony of management employees regarding the company's affirmative action programs and two hundred pages of exhibits (including policy statements, in-house newspaper articles, and letters) lauding the company's commitment to equal opportunity. *Id.* at 4a. Petitioner also compared its female representation in broad occupational categories to female representation in the labor force using regional and national census data. *Id.* at 37a-38a.

3. The district court held that petitioner had not engaged in a pattern and practice of excluding women from higher-paid hourly and salaried jobs. Applying a disparate treatment analysis, the district court concluded that petitioner rebutted any inference of discrimination created by EEOC's statistical and anecdotal evidence. Pet. App. 39a. The district court rested its conclusion on findings (1) that EEOC's statistical studies failed to analyze "in a meaningful way the extent to which career interests differed between males and females, and the effect of these differences upon the placement of employees," *id.* at 34a; (2) that petitioner had an active commitment to equal employment opportunity, *id.* at 28a-33a; and (3) that the distribution of women in petitioner's work force compared favorably with that found in public utilities and in the regional and national labor force as a whole according to census data, *id.* at 37a-38a. Although the district court found EEOC's evidence of individual instances of discrimination to be "uncontroverted," it found those examples insufficient by themselves to establish class-based discrimination. *Id.* at 38a.

4. A unanimous panel of the Ninth Circuit reversed. Pet. App. 17a. It held that the district court abused its discretion in admitting petitioner's "voluminous" evidence of its "equal employment opportunity" efforts where it had earlier precluded the EEOC from discovering self-critical portions of that same material. *Id.* at 4a-5a. The court of appeals explained that even those courts that have held self-critical statements to be privileged—on the theory that a qualified privilege would promote ameliorative efforts—have found the privilege to be waived when the employer voluntarily introduces evidence of its equal opportunity efforts in order to prove nondiscrimination. *Id.* at 5a. Petitioner's reliance on such evidence in this case, while excluding the self-critical portions of it, perpetrated a "one-sided presentation of a defense" and left the EEOC "ill-equipped to effectively cross-examine those of [petitioner's] witnesses who testified concerning the implementation and efficacy of [petitioner's] equal opportunity efforts." *Id.* at 5a-6a. Since "[f]ifteen of the [district] court's fifty-three findings related to [petitioner's] equal opportunity programs and policies," and since that "court discussed this evidence in a vastly more detailed manner than any other genre of [petitioner's] evidence," the court of appeals found it "clear * * * that the EEOC was prejudiced by this error." *Id.* at 6a.

The court of appeals held that the district court also erred when it held that the EEOC's regression analyses failed to establish discrimination. The "critical flaw" in those analyses, according to the district court, was that they "fail[ed] to adequately analyze differences in job interest between men and women," even though they "showed a disparity in hiring that correlates with sex, while controlling for the major legitimate factors." Pet. App. 14a. The court of appeals explained that the district court's reasoning was contrary to this Court's teaching in

Bazemore v. *Friday*, 478 U.S. 385, 400 (1986), that "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case." Pet. App. 7a (quoting *Bazemore*, 478 U.S. at 400 (Brennan, J., joined by all other Members of the Court, concurring in part)). To rebut EEOC's regressions, petitioner had to produce "credible evidence" that "curing the alleged flaws would also cure the statistical disparity—proof which [petitioner] did not offer." Pet. App. 14a. It was not enough "simply [to] point[ ] out possible flaws in the EEOC's data." *Ibid.*

The erroneous rejection of the EEOC's regression analyses was not harmless error, said the court of appeals, because petitioner's other evidence was insufficient to overcome the inference of discrimination raised by the EEOC's evidence. Petitioner's statistical data were recognized by the district court to be of "limited probative value" because the "most relevant data were based on skewed labor pools." Pet. App. 15a & n.11. Petitioner's comparisons of its work force with external labor markets did "little" to help one "understand[ ] whether women were precluded from higher paying jobs." *Id.* at 16a. Since petitioner's only remaining evidence was the improperly admitted equal employment opportunity evidence, the court of appeals could not find that petitioner overcame the inference of discrimination raised by the EEOC's evidence. *Id.* at 16a. Because the court of appeals could not determine how the district court would have ruled had it excluded the "affirmative action" evidence and properly assessed the statistical evidence, it reversed and remanded for a new trial. *Id.* at 17a.[2]

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[2] The court of appeals also ruled that the record was inadequate to assess the timeliness of the underlying promotion charge and remanded for determination of this issue as well. Pet. App. 17a n.13.

ARGUMENT

The court of appeals' decision simply paves the way for a fair consideration of the evidence in this 12-year old suit. Interlocutory review is not warranted.

1. The Ninth Circuit properly looked to this Court's decision in *Bazemore* for the correct standard by which to assess statistical evidence in a disparate treatment case. Like this case, *Bazemore* was a pattern and practice discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 478 U.S. at 386 (per curiam). As here, the plaintiffs in *Bazemore* presented multiple regression analyses that "account[ed] for the major factors" in the employment decision. 478 U.S. at 400 (Brennan, J., joined by all other Members of the Court, concurring in part); see *id.* at 398 (regressions accounted for race, education, tenure, and job title). But like the district court here, the lower courts in *Bazemore* found plaintiffs' regression analyses " 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.' " 478 U.S. at 400. This Court held that view of the evidentiary value of the regression analyses to be "plainly incorrect": "a regression analysis that includes less than 'all measurable variables,' may serve to prove a plaintiff's case." *Ibid.* Although there may be "some regressions so incomplete as to be inadmissible as irrelevant," *id.* at 400 n.10, and others flawed because they fail to "account[ ] for the major factors" in the employment decision, *id.* at 400, it is not sufficient for an employer "to declare simply that many factors go into" the employment decision. Instead, an employer confronted with a regression analysis that establishes discrimination after taking into account the major factors in the employment decision must make some attempt—"statistical or otherwise—to demonstrate that when these factors were properly organized and ac-

counted for there was no significant disparity" remaining. *Id.* at 403-404 n. 14.

a. In light of the legal standard established by this Court in *Bazemore* and followed by the Ninth Circuit in this case, petitioner sets up a straw man when it reads the court of appeals to say that "the defendant cannot rebut an inference of discrimination by * * * pointing to flaws in the plaintiff's statistics." Pet. 9-10 (ellipses in original) (quoting Pet. App. 12a).[3] As petitioner quickly notes in the margin, the court of appeals did not say that. It said—in the context of regression analyses which "controll[ed] for the major legitimate factors" in the employment decision, *id.* at 14a—that petitioner could not rebut an inference of discrimination "merely" by pointing to flaws in the EEOC's statistics. Pet. 10 n.8. That single adjective makes all the difference. Of course petitioner could discredit a regression analysis that is "so incomplete as to be * * * irrelevant" by pointing out that fact. *Bazemore*, 478 U.S. at 400 n.10. Petitioner could also undermine a regression analysis that failed to "account[ ] for the major factors" in the employment decision by pointing out that flaw, *id.* at 400; thus, the court of appeals noted that in *Penk* v. *Oregon State Bd. of Higher Educ.*, 816 F.2d 458 (9th Cir.), cert. denied, 484 U.S. 853 (1987), a case where plaintiff's regressions omitted the most critical factors in the promotion and tenure decisions at issue there (teaching quality, service, research, and scholarship), the defendant "could defeat any inference of discrimination" "by merely pointing out such omissions." Pet. App. 13a.

What petitioner could not do, and what it attempted to do in this case, was fault EEOC's otherwise rigorous regression analyses for taking insufficient account of one

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[3] Accord, Pet. 11 ("The Court of Appeals holds that pointing up flaws in a plaintiff's statistics is insufficient as a matter of law to defeat a claim of discrimination based on those statistics.").

variable without "demonstrat[ing] that when th[is] factor[ ] [is] properly organized and accounted for there was no significant disparity" remaining. *Bazemore*, 478 U.S. at 403-404 n.14; see Pet. App. 14a (petitioner "had to produce credible evidence that curing the alleged flaws would also cure the statistical disparity."). Hence, although the district court found fault with EEOC's "failure to analyze *in a meaningful way*" the effect of job interest on job placement, *id.* at 14a n.10, 34a (emphasis added),[4] it did not find that the job interest factor was a major factor in the employment decision that had been omitted altogether. It follows that the court of appeals properly required petitioner to bear the burden of producing "credible evidence" in response to EEOC's regression analyses to defeat the "strong inference of discrimination" they raised. Pet. App. 14a. Since the district court failed to require such a showing, the Ninth Circuit was compelled to remand for a proper assessment of the evidence.

Contrary to petitioner's intimation, Pet. 9-11, the court of appeals did not shift the burden of proof or impose on a defendant the requirement of presenting countervailing regression analyses. Following *Bazemore*, which recognizes that the burden of proof remains on the plaintiff, 478 U.S. at 400, the court of appeals merely placed upon petitioner the burden of producing "credible evidence" that legitimate factors explain the disparity. Nowhere did the court require that this evidence take the form of a regression analysis. Indeed, such a requirement would be inconsistent with *Bazemore*'s observation that the defendant in that case failed to make an attempt, "statistical *or otherwise*," to defeat plaintiff's showing of a disparity. 478 U.S. at 403 n.14 (emphasis added).

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[4] In fact, the regression analyses presented by the EEOC at trial controlled for job interest, albeit not to the satisfaction of the district court. Pet. App. 22a.

b. By its decision in this case, the Ninth Circuit has joined the Second, Eighth, and District of Columbia Circuits in holding that *Bazemore* requires the defendant to "do more than simply point out possible flaws in the proponent's statistical analyses in order to rebut the inference of discrimination raised by the statistical evidence." Pet. App. 8a. See *Sobel* v. *Yeshiva University*, 839 F.2d 18, 34 (2d Cir. 1988) ("We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis."), cert. denied, 109 S. Ct. 3154 (1989); *Catlett* v. *Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1266 (8th Cir. 1987) (defendant claiming flaws in plaintiff's definition of relevant work force "bore the burden of introducing evidence to show this failure was significant"), cert. denied, 485 U.S. 1021 (1988); *Palmer* v. *Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987) ("Implicit in the *Bazemore* holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by plaintiffs' statistics.").

The Seventh Circuit's decision in *EEOC* v. *Sears, Roebuck & Co.*, 839 F.2d 302 (1988), is no exception to the consensus interpretation of *Bazemore*, contrary to the view of petitioner, Pet. 12-14, and the court of appeals, Pet. App. 10a-12a. The Seventh Circuit in *Sears* did not hold that mere identification of alleged methodological flaws was enough to carry defendant's rebuttal burden. It addressed the entirely separate issue whether a defendant had to rebut a plaintiff's regression analysis with "a more probative *statistical* analysis" of its own. 839 F.2d at 313-314 (emphasis in original). The court of appeals

answered in the negative, and found persuasive the defendant's substantial non-statistical evidence, including expert testimony, to show women's lack of interest in the jobs at issue in that suit. 839 F.2d at 312-313. This reading of *Sears* accords with other Seventh Circuit precedent. See *Mister* v. *Illinois Cent. Gulf R.R.*, 832 F.2d 1427, 1431 (7th Cir. 1987) (courts will not discount plaintiff's statistics, despite their defects, where employer did not introduce facts sufficient to explain how omitted variable would account for hiring disparity), cert. denied, 485 U.S. 1035 (1988).

2. The court of appeals correctly held that the admission of petitioner's equal employment opportunity evidence was an abuse of discretion and prejudiced the EEOC. Moreover, the court's ruling that, when an employer voluntarily uses this kind of evidence to prove nondiscrimination, "it 'open[s] the door' and waives whatever qualified privilege may have existed" with respect to such evidence, is consistent with the only other circuit law on this question. Pet. App. 5a (quoting *Coates* v. *Johnson & Johnson*, 756 F.2d 524, 552 (7th Cir. 1985) (employer cannot offer its affirmative action policy as evidence of nondiscrimination and at the same time withhold self-critical evaluations that may undercut its favorable portrayal of its efforts)).

Here, petitioner's one-sided presentation prejudiced the EEOC. While the Commission did what it could to dispute petitioner's self-congratulatory evidence regarding its equal opportunity efforts, it was denied access to basic data needed for effective cross-examination. For example, while petitioner's Equal Opportunity Director was permitted to describe her department's monitoring of employment decisions, Pet. App. 28a-33a, the EEOC was barred from discovering the availability figures and utilization standards used by petitioner in the monitoring process.

Such evidence bears directly on the issue of intent and thus goes to the heart of this disparate treatment case.

It is also clear that the equal employment opportunity evidence played a highly significant role in the district court's assessment of the case. More than one-quarter of the court's findings were devoted to this evidence, Pet. App. 6a, 28a-33a, and, as the court of appeals noted, this evidence was discussed by the district court "in a vastly more detailed manner" than any of the other evidence. *Id.* at 6a. See also *id.* at 24a (district court places "special emphasis" on affirmative action evidence). The emphasis placed on the equal employment opportunity evidence directly affected the outcome of the case. As the court of appeals observed, since the district court found petitioner's statistical data to be of limited probative value, it looked to the equal employment opportunity evidence to reinforce its conclusions. *Id.* at 15a.

CONCLUSION

The petition for a writ of certiori should be denied.

Respectfully submitted.

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